No. 16-8255

IN THE

Supreme Court of the United States

ROBERT McCOY,

Petitioner,

v.

THE STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

BRIEF OF *AMICUS CURIAE* THE CRIMINAL BAR ASSOCIATION OF ENGLAND & WALES IN SUPPORT OF PETITIONER

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2 William Hawkins, *A Treatise of the Pleas of the Crown*, (London, Eliz. Nutt and R. Gosling 1721) 3

INTEREST OF AMICUS

The Criminal Bar Association of England and Wales ("C.B.A.") was formed in 1969, and currently has nearly 4000 members. The C.B.A. provides continuing professional development, accreditation, information about the law, programs to assist barristers in their work, and advice and initiatives to improve the Criminal Justice System for the public.[1]

The members of the C.B.A. have a profound interest in, as well as knowledge of, the U.K. criminal justice system, including its history, stretching back hundreds of years. Members of the C.B.A. have academic as well as practical experience in the evolution of the common law. Because of the shared history of the U.K. and the U.S. legal systems, and its relevance to this case, *Amicus* hopes that its commentary on that evolution can be of assistance to this Court.

SUMMARY OF ARGUMENT

One manner of seeking an informed understanding of the bill of rights amendments to the U.S. Constitution is to consider what a particular constitutional provision would have meant to the Framers at the time the Bill of Rights was debated and adopted.

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1. Pursuant to Rule 37 of this court, no counsel for a party authored the brief in whole or in part and no counsel for a party, or a party, made a monetary contribution intended to fund the preparation or submission of the brief. Both parties have consented to the filing of this brief.

The practice of the English[2] courts in the mid-eighteenth century informs both the evil from which the Framers sought to protect U.S. citizens, and the manner in which an Amendment was intended to provide that protection.

As we understand it, the question presented to this Court is whether it violates a criminal defendant's Sixth Amendment right to the assistance of counsel if defense counsel concedes the defendant's guilt over the defendant's express objection?

As we show below, in the mid-eighteenth century, barristers and solicitors played narrow, clearly defined roles, when they appeared for the defense. The prosecution of a British citizen focused upon the defendant himself. The law required that he personally enter his plea, and only the defendant could argue his case to the jury. Thus, no English legal practitioner could rise to his feet and argue his client's guilt to the jury, much less declare his guilt against the defendant's express instructions. These traditions have carried forward to the present. It is the

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2. There are significant distinctions in this regard between geographical nomenclatures – for example, England, the United Kingdom and Great Britain all refer to different elements of the British Isles, and this does not take account of the Empire that existed in the eighteenth-century. To be sure, England, Wales and Scotland have had the same monarch since 1603 (along, at different times, with parts of Ireland), and the Treaty of Union between England and Scotland was signed in 1706. However, certain legal traditions have always been different in Scotland. For the sake of simplicity, *Amicus* will refer to the law "of England" at the time, albeit as elucidated by decisions from other countries in what was once the British Empire.

defendant, not his counsel, who selects his defense, and counsel is duty-bound to carry it through. What took place in this case would be viewed as a patent, structural violation of the law in commonwealth jurisdictions, such that reversal of the conviction would be automatic.

ARGUMENT

I. BEFORE 1791: COUNSEL PLAYED A LIMITED, MODEST ROLE IN REPRESENTING CLIENTS FACING CRIMINAL CHARGES; ONLY THE DEFENDANT COULD DETERMINE AND ARGUE HIS DEFENSE

The Sixth Amendment's guarantee to the *assistance* of counsel was adopted at a time when counsel were just beginning to appear for the defense in eighteenth-century England. Until the passing of The Trials for Felony Act, 1836, 6 & 7 Will. 4, c. 114, persons accused of felonies (apart from high treason, since 1696) had no right to be represented by counsel at their trial. The rationale for not requiring the assistance of counsel was given by Hawkins in *A Treatise of Pleas of the Crown* (1721):[3]

> It requires no manner of Skill to make a plain and honest Defence, which ... is always the best; the Simplicity and Innocence, artless and ingenuous Behaviour of one whose Conscience acquits him, having something in it more moving and convincing than the highest Eloquence of a Person speaking in a cause not their own.

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3. 2 William Hawkins, *A Treatise of the Pleas of the Crown* 400 (London, Eliz. Nutt and R. Gosling 1721)

As this passage shows, the defendant's direct participation in his trial was considered all-important. Arraignment had to take place in person. In most trials in the late 1700's, the defendant represented himself. He would cross-examine prosecution witnesses, present his own defense and witnesses, and argue to the jury why he should not be convicted, or convicted of a lesser crime.

Barristers and solicitors began to appear as defense counsel in the later part of the eighteenth-century in large part in response to their increasing use by the prosecution. When they did appear for the defense, however, their role focused on discreet tasks. These advocates were limited to arguing points of law, beginning at arraignment, and later at trial. Due to the harsh penalties that attached to many offenses, lawyers became adept at advancing technical points to lessen the charge.[4] As time went by, they were allowed to cross-examine some prosecution witnesses. But the defendant remained the central figure in his own defense, and only the defendant could raise his defense and argue it to the jury. As legal scholars have confirmed: "Counsel were not allowed, however, to act in those areas in which defendants had always been on their own. In particular, counsel were not allowed to speak to the jury on their client's behalf or to offer a defense against the facts put in evidence."[5] That was the client's responsibility.

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4. *See* John H. Langbein, *The Origins of Adversary Criminal Trial* 169-170 (2003)

5. John M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 Law & Hist. Rev. 221, 230-31 (1991).

Thus, defense advocacy in the eighteenth-century was sharply confined. It was the defendant who made the all-important decisions regarding his defense. Counsel could offer assistance limited to arguing points of law and cross-examining some prosecution witnesses.

There is nothing in the common law history of counsel-client relations before the adoption of the Bill of Rights to suggest that such assistance empowered the advocate to ignore or override the client's manifest instruction as to his plea and defense. Given the evolving but still limited role of defense counsel, it is not surprising the Sixth Amendment – ratified in 1791 – guaranteed that a person facing imprisonment should be permitted the "*assistance* of counsel for his defense".

II. IN COMMON LAW JURISDICTIONS TODAY COUNSEL MAY NOT CONCEDE GUILT AGAINST INSTRUCTIONS FROM THE CLIENT

This tradition, that the defendant, not learned counsel, controls what his defense to the criminal charge will be, continues to this day. To our knowledge, all common law jurisdictions adhere to the eighteenth-century practice that the defendant determines the fundamental objectives regarding his defense. The client controls the all-important decisions of how to plead and what his defense shall be, and the lawyer must follow his client's instructions. This balance of power is reflected both in case law and professional conduct regulations. Counsel may advise and advocate vigorously as to what the plea and defense shall be. But once the client has given instructions, the lawyer must act to carry out the defense, so long as they don't offend ethical canons. Under no circumstances,

may counsel ignore the instructions and concede guilt.[6] We review the practice in several of these jurisdictions below.

A. England and Wales

In England and Wales, statements of guilt must be made in person by the accused and, in the case of submissions, by counsel in accordance with the client's wishes. *R. v. Ellis*, (1973) 57 Cr. App. R. 571 (Eng.). Barristers must not put forward any case inconsistent with their client's instructions. In *R. v. Clinton* [1993] 1 W.L.R. 1181 (1993) 2 All E.R. 998 (Eng.), the Court of Appeal considered the question of departure from instructions:

> The court was rightly concerned to emphasise that where counsel had made decisions in good faith after proper consideration of the competing arguments, and, where appropriate, after due discussion with his client, such decisions could not possibly be said to render a subsequent verdict unsafe or unsatisfactory.

Id. at 1187.

Conversely, the court held, where a decision was taken "either *in defiance of or without proper instructions*," the situation is reversed. Then, the conviction is unsafe. *Id. at 1187-88.* For example, in *R. v. Irwin* [1987] 1 W.L.R.

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6. To be clear on one issue: counsel may find himself professionally embarrassed, and therefore unable to proceed on a case consistent with the client's instructions. That is a separate issue, and counsel may have a duty to withdraw from the case. But never may counsel remain on the case and go against the client's instruction to present a defense of not guilty.

902, (1987) 2 All E.R. 1085 (Eng.), two alibi witnesses had been presented to an initial, hung jury. At the second trial, counsel decided, without consulting with his client, not to present the alibi defense. This course of action was condemned by the reviewing court and the conviction was reversed.

> Certain it is, whether that supposition is correct or not, that he made no communication of his intention to his client. If he had done so he would have been, in the view of this Court, fully entitled, no doubt explaining his reasons, to give his client the appellant very strong advice. The appellant might then have accepted that advice. He might have declined to accept it and insisted on the witnesses being called. Counsel might then have accepted his instructions and called the witnesses or he might have asked the learned recorder to discharge him from further service to his client. Yet a further possibility is that the appellant himself, dissatisfied with the advice, might have asked the recorder to adjourn the case to allow a re-trial, to allow him other counsel even at that stage or to permit him to continue the case on his own. All those possibilities would have been dealt with if they had arisen, no doubt in an appropriate manner. None of them did arise for the simple reason that the appellant was not given any opportunity of protesting against his counsel's decision. In those circumstances it is immaterial whether the decision of counsel was right or wrong.

In England and Wales, this legal rule is buttressed by counsel's ethical duties that confirm the client decides the objectives of the representation:

> You are obliged ... to promote and to protect your client's interests so far as that is consistent with the law and with your overriding duty to the court... Your duty to the court does not prevent you from putting forward your client's case simply because you do not believe that the facts are as your client states them to be (or as you, on your client's behalf, state them to be), as long as any positive case you put forward accords with your instructions and you do not mislead the court. *Your role when acting as an advocate or conducting litigation is to present your client's case, and it is not for you to decide whether your client's case is to be believed.*[7]

Indeed, as a matter of English practice, it amounts to misleading the court for the barrister to put forward a case that is inconsistent with the client's instructions.[8] The barrister in *R. v. Clinton* was subject to an ethical complaint, and *Amicus* would expect the same to happen to any criminal barrister who conceded the client's guilt against his client's instructions.

B. Other Common Law Jurisdictions Adhere to this Approach

Other countries share this view that it is the client who determines the plea and defense and counsel is required to

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7. Bar Standards Board, *The Bar Standards Board Handbook* C. The Conduct Rules, C1. You and the Court at gC6 (3rd ed. April 2017) *available at* https://www.barstandardsboard.org.uk/media/1826458/bsb_handbook_31_march_2017.pdf (last visited Nov. 7 2017)

8. Susan Blake, *A Practical Approach to Effective Litigation*, § 24.38 (8th ed. 2016)

advance that defense. In Australia, long settled precedent forbids counsel from conceding guilt and abandoning his client's defense. In *Tuckiar v. The King*, [1934] HCA 49, (1934) 52 CLR 335, (Austl.) defense counsel disclosed a privileged communication impeaching the client and failed to request an acquittal. The client was subsequently convicted and sentenced to death. In overturning the conviction, the High Court referred to counsel's conduct as "indefensible" and a "grave mistake." *Id.* at 354. "Why he should have conceived himself to have been in such a predicament, it is not easy for those experienced in advocacy to understand. He had a plain duty, both to his client and to the Court, to press such rational considerations as the evidence fairly gave rise to in favour of complete acquittal or conviction of manslaughter only . . . ." *Id.* at 346. The High Court confirmed that counsel could not abandon his [client's] defense. *Id.*

The Australian rule is well stated in the textbook by Dal Pont:

> Having accepted a brief, a defence lawyer is duty bound to defend the accused irrespective of any belief or opinion he or she may have formed as to the accused's guilt or innocence. Assessment of guilt or innocence is for the court, not counsel. In the well-known words of Bramwell, B: "A client is entitled to say to his counsel, 'I want your advocacy and not your judgment; I prefer that of the court.'"[9]

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9. Gino Dal Pont, *Lawyers' Professional Responsibility* 604 (5th ed. 2012) (footnotes omitted), citing *Emerson v. Sparrow* (1871) LR 6 Ex 329, 371.

Defense counsel cannot depart from the client's instructions, after a plea of not guilty, by making statements to the decision maker to the effect that the defendant is guilty. The defendant's right to personally plead has statutory force and must be respected. Counsel may not deviate from the client's instructions when it comes to whether they will plead guilty, or whether they will give evidence.[10]

In New Zealand, defense counsel is not entitled to disregard the instructions of the defendant with respect to the nature of the defense. *R. v. McLoughlin* [1985] 1 NZLR 106 (CA). In *McLoughlin*, the defendant instructed counsel to present an alibi defense to a rape charge. Counsel took the view that this defense was implausible, and instead presented a consent defense. The court held that counsel was not entitled to defy the instructions of a client. It held that a failure to follow instructions gives rise to a miscarriage of justice. The court observed:

> It is basic in our law that an accused person receive a full and fair trial. That principle requires that the accused be afforded every proper opportunity to put his defence to the jury (cf s 354 of the Crimes Act 1961). The present appellant has been deprived of that opportunity and justice has therefore been denied to him. Such a denial can be made good only by the ordering of a new trial.

Id. at 107.

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10. Dal Pont, *Lawyers' Professional Responsibility* at 608.

In New Zealand, departure from a client's instructed plea is also a violation of the rules of professional conduct. The ethical duties placed on the defense lawyer are set out in the New Zealand Lawyers and Conveyancers Act Rules 2008. These rules set a clear balance towards respecting the client's wishes. Short of misleading the court, a defence lawyer must "put before the court any proper defence in accordance with his or her client's instructions..."[11]

The practice is the same in Scotland. It is for the accused to decide whether he wishes to plead guilty and defense counsel, referred to as an advocate, must follow the client's instructions regarding the defense. The courts there have confirmed that when an advocate advances a defense against the client's clear instructions, the conviction must be reversed. *Anderson v. H. M. Advocate* [1996] J.C. 39 (Scot.). A fair determination of guilt cannot occur when

> the accused was deprived of the opportunity to present his defence, *or because his counsel or solicitor acted contrary to his instructions as to the defence which he wished to be put* or because of other conduct which had the effect that, because his defence was not presented to the court, a fair trial was denied to him.

Id. at 44 (emphasis supplied).

The duty of the advocate to carry out the defense as instructed by the client is confirmed by the Faculty of Advocates' Code of Conduct, and strongly supports the rule proposed by Petitioner:

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11. Lawyers and Conveyancers Act Rules 2008 Rule 13.13(b) (N.Z.)

> An Advocate is however obliged to follow instructions as to basic matters such as the line of defence in criminal cases. If he is unable to do so in a manner which allows him to fulfil his duties to the Court he should withdraw from acting.[12]

In Ireland, the duty of counsel to adhere to the defendant's choice of defense is found in the canons of ethics. The ethical duties of the barrister provide that it will be a breach to concede the guilt of a client who maintains their innocence.

Where the client maintains innocence, defence lawyers are obliged to attempt to expose weaknesses in the prosecution case.[13] Section 10.14 of the Code of Conduct for the Bar of Ireland provides that:

> Barristers are under a duty to defend any accused person on whose behalf they are instructed irrespective of any belief or opinion they may have formed as to the guilt or innocence of that person.

In Canada, the accused has the autonomy to determine the fundamental objectives of the defense, as well as the decision of how to plead, and counsel is obligated to follow the client's instructions'. *R. v. Szostak* (2012), 111 O.R. 3d

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12. Faculty of Advocates, *Guide to the Professional Conduct of Advocates* § 1.2.3, (Oct. 2008), http://www.advocates.org.uk/media/1417/guide-to-conduct-fifth-edition.pdf (last accessed Nov. 17, 2017)

13. Thomas O'Malley, *The Criminal Process* § 14.48 (2009).

241 (Can. Ont. C.A.). In *Szostak*, the defendant appealed his conviction arguing that trial counsel raised his fitness to stand trial without instructions. Although the court dismissed appellant's case for failure to prove that counsel defied his instructions, it asserted that "control over the defence is a necessary consequence of the values of dignity and autonomy that underlie our adversarial system." *Id.* at 77. The court further stated:

> [C]ounsel must obtain instructions about decisions fundamental to the defence of a case. In my view, that includes obtaining instructions as to whether or not to pursue a [not criminally responsible on account of disorder] defense. Accused persons provided with all the necessary information may act irresponsibly and against their own best interests, but that is their right.

Id. at 78.

In Canada, departure from a client's instructed plea is a violation of the rules of professional conduct. As the court held in *R. v. G.D.B.*, [2000] 15 C.R. 520 (Can.) "there are decisions such as whether or not to plead guilty, or whether or not to testify that defence counsel are ethically bound to discuss with the client and regarding which they must obtain instructions." *Id.* at 533. The ethical duties of lawyers are detailed in the *Law Society of Alberta Code of Conduct 2017*. These rules obligate the lawyer to follow a client's instructions on certain fundamental decisions regarding litigation. According to Rule 3.2-4[2], a lawyer must obtain instructions from the client on "[c]ertain decisions in litigation, such as how a criminal defendant will plead, whether a client will testify, whether to waive

a jury trial and whether to appeal..."[14] Rule 5.1-1 provides that "a lawyer must represent the client resolutely and honourably." Where a client admits guilt to his lawyer, the lawyer is "entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged..." *Id.*

In South Africa, counsel must follow the client's instructions and cannot make fatal concessions that harm his client's defense. In *S v. Mofokeng* 2004 (1) SACR 349 (W), Louw AJ said:

> Counsel also is not the judge. He does not have, nor should he have, the distance to adjudicate on the strength and weaknesses of his client's cause. He must, of course, advise his client on the probable findings of the court but he must fearlessly argue his client's case even if he, himself, does not believe that the case is right or just. Whilst he is an officer of the court, he is a representative of a litigant and he does not have the luxury to distance himself from his client's instructions and to *condemn his client by making fatal concessions.* In the final analysis, he is but a representative of his client, a mandatory. It is his duty to carry out his mandate and to take all reasonable steps to accomplish his aim. He must perform his obligations in accordance with the terms and

14. Law Society of Alberta, Code of Conduct (Sept. 28, 2017), http://dvbat5idxh7ib.cloudfront.net/wp-content/uploads/2017/01/14211909/Code.pdf. (last accessed Nov. 19, 2017)

> limitations of his mandate. If he does not do so, he is no representative.
>
> * * *
>
> [W]ithin the four corners of the ethics which bind each defence advocate, counsel is not free to make submissions designed to destroy his client's case, or which may have that effect. He is, of course, in control of the presentation of the defence case... and he may otherwise bind his client through "vicarious admissions"... but where he, to the knowledge of the court, refutes his instructions, he fails to act as a representative.

Id. at ¶ at 35g-i, 357f-g (emphasis supplied).

In his commentary on South African law, Étienne du Toit writes that:

> "Grave incompetence, resulting in a fatal irregularity, is present where a legal representative ... does not establish the defence of his client..."[15]

Thus, South African law goes further than the rule sought by Petitioner. In *S. v. Mafu and Others* 2008 (2) ALL SA 657 (W) (S.Afr.) at ¶15, for example, counsel's failure to put an affirmative alibi defense was held to breach "the very rudimentary duties of counsel when defending an accused."

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15. Étienne du Toit, *et al.*, *Commentary on the Criminal Procedure Act* ¶¶ 11-42E (1987)

Various countries in the West Indies – Jamaica, Trinidad & Tobago (T&T), for example – have individual courts that grew out of the English legal tradition. There is no significant difference between the approaches of the different courts.

In these countries, defense counsel has no power to depart from the client's instructions on the issue of guilt, or to make representations that the defendant is in fact guilty. While counsel cannot propose an affirmative defense if the client says it is untrue, short of this a lawyer should follow the client's instructions as to the case. *See Boodram v. The State* [2002] UKPC 20.[16] (T&T).

The Privy Council has held that the approach to departures from pleas reflects the one set out in *Anderson v. H. M. Advocate*, the rule in Scotland. Counsel may not depart from the substance of their client's plea, and fail to present their defence. *Balson v. The State* [2005] UKPC 2 (Dominica) at ¶36

Indeed, the West Indian practice reflects a rule broader than the one claimed by Petitioner McCoy. In *Ebanks v. R.*, (2006) UKPC 16, a Privy Council case that originated from the Cayman Islands but referenced law from Trinidad and Tobago, the appellant alleged that counsel had "defied his instructions" by not challenging police evidence.[17] Lord Rodger said that even if counsel deemed it tactically inadvisable, "counsel must carry out

16. *See also* Dana S. Seetahal, *Commonwealth Caribbean Criminal Practice and Procedure* 230 (4th ed. 2014).

17. *Id.* ¶31.

[his client's] instructions even though he was aware"[18] of the adverse impact they might have on the case. He went on to say that "even if [the appellant] had all along said that he would not give evidence, that would not, of itself, have been a reason why counsel could not have cross-examined the police officers to the effect that he had not made the statement, if [the appellant's] instructions were that counsel should do so. Indeed, as a matter of proper professional practice, he would still have been bound to do so." *Id. at* ¶30.

An authoritative treatise on Caribbean practice emphasizes "the necessity on the part of defence counsel to take written instructions and to act on those instructions. If counsel finds that he cannot do so, he must so indicate and seek leave to withdraw from the defence."[19] Indeed, as *Amicus* has illustrated, this is the basic rule across the common law world.

In Kenya, a Kenyan advocate must follow the client's legal instructions.[20] There is no reported case where a defense counsel has taken a position that is contrary to their client's instructions with regards to the plea.

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18. *Id.* ¶28.

19. Seetahal, *Commonwealth Caribbean: Criminal Practice and Procedure* 230.

20. As of September 2015, 21 Kenyan lawyers had been charged by the Law Society of Kenya with the specific offence of failing to comply with the client's instructions: Law Society of Kenya, Code of Ethics and Conduct for Advocates, (Sept 2015), *http://www.lsk.or.ke/Downloads/LSK-CODE-OF-CONDUCT-AND-ETHICS-FOR-ADVOCATES-(1ST%20DRAFT).pdf* (last accessed Nov. 20, 2017)

CONCLUSION

The common law tradition, developed over centuries across the English-speaking world, mandates that if the client gives clear instruction that his defense is to be "not guilty", defense counsel is required to honor that instruction and is forbidden to argue his client is guilty.

Respectfully submitted,

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